

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v Asif [2000] FCA 228

IMMIGRATION- whether or not the Immigration Review Tribunal's decision not to grant a spouse visa to the respondent was affected by actual bias - Immigration Review Tribunal's failure to consider evidence other than that of respondent on the issue of his commitment to his marriage

Migration Act 1958 (Cth) ss 31 and 476(1)(f)
Migration Regulations 1994 (Cth) reg 1.15A and 2.03

Sun v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71 cited
Sarbjit Singh v Minister for Immigration and Ethnic Affairs (Lockhart J, 18 October 1996, unreported) cited
Galea v Galea (1990) 19 NSWLR 263 applied

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v
MUHAMMAD ASIF
N 1351 OF 1999

DRUMMOND, NORTH AND MADGWICK JJ
7 MARCH 2000
SYDNEY

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

N 1351 OF 1999

**ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF
AUSTRALIA**

**BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS
APPELLANT**

**AND: MUHAMMAD ASIF
RESPONDENT**

JUDGES: DRUMMOND, NORTH AND MADGWICK JJ

DATE OF ORDER: 7 MARCH 2000

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

THE COURT:

- 1 This is an appeal from a decision of Mansfield J setting aside a decision of the Immigration Review Tribunal. The Tribunal affirmed a decision that the respondent was not entitled to a sub-class 820 spouse visa made by the respondent's delegate and then confirmed by an internal review officer. The only ground upon which review of the Tribunal's decision by the learned primary judge was sought was that it was affected by actual bias: see s 476(1)(f) the *Migration Act 1958* (Cth). His Honour held that that ground was made out, set aside the Tribunal's decision and directed that the respondent's visa application be remitted for rehearing to a Tribunal differently constituted.
- 2 There was no dispute either before the learned primary judge or this Court as to the principles to be applied in determining whether a Tribunal decision is affected by actual bias. It is enough, for present purposes, to note that before a finding can be made of actual bias sufficient to invalidate a decision, the Tribunal must "as least in some respect [have] prejudged the case, so as to be unable or unwilling to decide it impartially": *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 127. The fact that a decision-maker

has formed a preliminary conclusion about an issue is not sufficient to indicate bias: “There will be actual bias only when preliminary views are incapable of alteration”. See *Sun* at 123. “Bias is not synonymous with absence of good faith; a person may in all good faith believe that he was acting impartially, but his mind may nevertheless be affected unconsciously by bias.”: *Sarbjit Singh v Minister for Immigration and Ethnic Affairs* (Lockhart J, 18 October 1996, unreported).

- 3 Before a person is entitled to a sub-class 820 visa of the kind sought by the respondent, he is required by s 31(3) of the Act and reg 2.03 the Migration Regulations 1994 (Cth) to satisfy certain “primary criteria” set out in Sch 2 to the Regulations, which include the following:

“820.21 Criteria to be satisfied at time of application

820.211(1) ...

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse of an Australian citizen ...

...

820.22 Criteria to be satisfied at time of decision

*820.221(1) In the case of an applicant referred to subclause 820.211(2) ...
the applicant either:*

*(a) continues to meet the requirements of the applicable
subclause; or*

(b) meets the requirements of subclause (2) or (3)

...”

- 4 The term “spouse” is defined in reg 1.15A as follows:

*“(1) For the purposes of these Regulations, a person is the spouse of
another person if:*

(a) the 2 persons are:

*(i) married to each other under a marriage that is
recognised as valid for the purposes of the Act; or*

*(ii) de facto spouses of each other, as set out in
subregulation (2); and*

- (b) *the Minister is satisfied that:*
 - (i) *the 2 persons have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between the 2 persons is genuine and continuing; and*
- (c) *the Minister is satisfied that the 2 persons are:*
 - (i) *living together; or*
 - (ii) *not living separately and apart of a permanent basis.*
- (2) *A person is the de facto spouse of another person:*

...
- (3) *In forming an opinion for the purposes of paragraph (1)(b) and (c) in relation to an application for a visa of subclass 100, 801, 820 or 831, the Minister must have regard to all the circumstances of the relationship, including, in particular:*
 - (a) *the financial aspects of the relationship, including:*
 - (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*
 - (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day household expenses;*
 - (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
 - (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other*

people as being married or in a de facto relationship with each other;

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities;

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) In forming an opinion for the purposes of paragraph (1)(b) or (c) in relation to an application for a visa of a subclass other than 100, 801, 820 or 831, the Minister may have regard to any of the factors set out in subregulation (3).

(5) If a person has been living with another person for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason."

5 The respondent is a Pakistani citizen who married an Australian citizen on 4 November 1995. He lodged his spouse visa application on 24 November 1995. The appellant's delegate refused it on 24 February 1998 and the appellant's internal review officer affirmed that refusal on 12 August 1998.

6 The Tribunal gave as its conclusion for affirming the decision refusing the visa sought by the respondent the following:

"As stated earlier, having considered the evidence, I am not satisfied that the Visa Applicant had a genuine commitment as at the date of application. This is because within four weeks of entering into a marriage he denied to a Departmental Officer that he was married. At the hearing before me, he stated that he never lied to the Department. As may be seen from the chronology set out earlier, throughout his period of stay in Australia, the Visa Applicant had lied, presented forged documents and changed evidence, all

designed to secure permanent residence. Truth had no relevance to him.

As stated earlier, it is possible that, irrespective of his lies, his commitment to the marriage could be genuine. However, there is insufficient evidence to persuade me that this was the case at the date of primary application [ie 24 November 1995].

Having made the above finding, it is not necessary for me to determine his commitment at the date of this decision. Suffice to say, and after his Class 816 was rejected, and having lived with his spouse since November 1995, he may now have formed a genuine commitment to her. However, this was not the case at the date of primary application.”

- 7 The Tribunal here speaks of whether the respondent had “a genuine commitment” and whether “his commitment to the marriage could be genuine”. The Tribunal appears to be dealing with both issues the subject of reg 1.15A(1)(b), which requires the decision-maker to be satisfied, firstly, that “the 2 persons have a mutual commitment to a shared life as husband and wife” and, secondly, that “the relationship between the 2 persons is genuine and continuing”, in order to justify the conclusion that, at the relevant time, the visa applicant was the “spouse” of an Australian citizen.
- 8 The respondent has lived in Australia since July 1989, save only for a seven month period between late 1989 and early 1990. He has a long history of lying to Immigration Department officials in order to obtain the various entry permits and visas he has sought since 1989. One of these lies attracted particular comment by the Tribunal. When interviewed by a Department officer on 5 December 1995 in connection with his then current class 816 entry permit application, he was asked his marital status: he said he was single. He said this only a month after his marriage. In a statutory declaration which he lodged with the Department in February 1998, eighteen months or so after his class 816 permit application had been refused, he acknowledged he had lied at this interview and offered, in explanation, that he was afraid that if he revealed his true marital status, that would have led to cancellation of the temporary visa he then held, something which would bar him from applying for permanent residence. However, when asked by the Tribunal member at the hearing about his history of deceit in his contact with the Department, he asserted he had not lied in connection with any of his previous applications. The Tribunal member’s response was to say:

“The funny thing is, I believe what you are saying now, especially regarding one interview. I will find that you did tell the truth there. That’s where you said you are not married. I now believe you then.”

9 At about this point in the hearing, the following exchange took place between the Tribunal member (Mr Metledge) and the respondent's solicitor (Mr Levingston):

“MR METLEDGE: Well, he says to me that in all his interviews with the Department he has told the truth.

MR LEVINGSTON: Yes.

MR METLEDGE: One particular interview where he was specifically asked, ‘Are you married?’ he said, ‘No’, and they went on. I can show you the record of interview.

MR LEVINGSTON: I know.

MR METLEDGE: Well, if I believe that, then he is not married, is he?

MR LEVINGSTON: That’s correct. I’m not quite sure that he appreciates that at this stage.

MR METLEDGE: Well that doesn’t matter.

MR LEVINGSTON: No, I understand that, Member.

MR METLEDGE: How does that matter? If it does, please explain it to me. I want to afford him as much procedural fairness as I can. I mean, what is there to appreciate - ‘Did you tell lies to the Department?’ ‘No I did not.’ ‘Did you tell lies at any interview?’ ‘No I did not.’ ‘Did you tell them, speaking to them or in writing?’ ‘No.’ What is there to appreciate? You mean he doesn’t appreciate the ramifications so perhaps he can make another lie to cover the original one?

MR LEVINGSTON: That is always one alternative, Member, but it may be that if he was put the question, ‘On a particular date were you married?’ and then asked why at the interview he didn’t disclose that, that might be another way of approaching it.

MR METLEDGE: Why? I asked him, ‘Did you tell any lies to the Department?’ He said, ‘No.’ There’s nothing to rationalise. I accept that. I accept he told the truth on that day. He said he did and I accept that.”

10 It has never been in doubt that the respondent's marriage on 4 November 1995 was a valid marriage. In telling the respondent that he considered the respondent did tell the truth when he said at the December 1995 interview that he was not married, the Tribunal member was not casting any doubt on that undisputed fact. That appears from what occurred towards the end of the hearing: the Tribunal member returned to what had earlier occurred and raised with Mrs Asif the possibility that the respondent, in denying at his 1995 Departmental interview that he was married, may have been acknowledging that he did not then regard

himself “in his heart or in his conscience” as truly married to her. (The probabilities of that being a correct evaluation of what the respondent meant when he said at the 5 December 1995 interview that he was not married are diminished by the respondent’s addiction to deceit in pursuing immigration advantages; it is unlikely that for once he was being truthful. They are also diminished by his explanation, subsequently given, that he told that lie to advance his claim for permanent residence here and by the confirmation of the truth of that explanation provided by his wife, whose evidence the Tribunal accepted. Those probabilities are further diminished by the fact that three and a half years later the respondent was still cohabiting with his wife and her son in what not only he but outside observers asserted had the look of a genuine marriage.)

11 It can also be seen from the conclusion reached by the Tribunal in the passage from its reasons for decision set out above that it determined the case on the basis that even though the respondent may have formed a genuine commitment to the marriage by the time of the hearing before the Tribunal, it was not prepared to accept his evidence on that issue as at the date of his visa application. In its assessment of his credibility, the Tribunal made particular reference to his lie in the 5 December 1995 interview about not being married. But it is apparent that the Tribunal based its conclusion that the respondent did not have a genuine commitment to the marriage at the date of the visa application not only on that lie, but on the respondent’s long history of deceit in his dealings with the Immigration Department, all of which showed he had no regard for the truth.

12 The learned primary judge made these observations about the Tribunal’s rejection of the respondent’s evidence:

“[20] ... that summary of the reasons shows that the Tribunal was prepared to place no weight on the applicant’s evidence in the light of his migration history. It was entitled to take that view. It also took into account his positive disavowal of the marriage on 5 December 1995. It was entitled to do that also.”

13 His Honour also said:

“[36] It is evident that the Tribunal member had the view that the applicant, and in practical terms only the applicant, could persuade him by acceptable evidence that the marriage relationship was a real and genuine one. His observations to the applicant’s solicitor, when it was proposed to call the

applicant's mother-in-law to give evidence, was that he was prepared to accept that from an outsider's point of view (i.e. that of the mother-in-law) the appearances of a genuine courtship and marriage existed. Ms Asif's evidence of their courtship was to the same general effect. However, the Tribunal member made it clear that their evidence did not go directly to the state of mind of the applicant as to whether he had a genuine commitment to the marriage."

14 His Honour also noted, at [37], that it was understandable, given the history of deceit on the respondent's part that the Tribunal may have commenced the hearing having "formed a preliminary view that the applicant had entered the marriage as yet another attempt to secure a right to permanent residence in Australia. Indeed, having regard to the applicant's migration history, it is understandable that he may have formed just such a preliminary view". His Honour then correctly observed that before actual bias could be found, it was necessary that the Tribunal's mind should be seen to be so fixed "that any evidence would not, or could not, persuade him to an opposite conclusion".

15 The learned primary judge considered that actual bias on the Tribunal's part was shown, firstly, by the Tribunal's line of questioning and comments with respect to the lie the respondent told in his interview of 5 December 1995 denying that he was then married. His Honour said that what the Tribunal had to say about all this:

"[40] ...indicates in my view, a determination to reject the applicant's evidence as to the genuineness of the marriage come what may. I considered whether the Tribunal member may have been accepting the marriage, but using the reference to marriage as a shorthand way of referring to the applicant's commitment to the marriage, but I do not think that his words lend themselves to that interpretation. The solicitor for the applicant invited the Tribunal member to ask the applicant why he had not disclosed the marriage at the interview on 5 December 1999, but initially the Tribunal member questioned the utility of doing so because he accepted the truth of that interview, and then asserted to the applicant that he accepted the truth of his then statement that the applicant was not married. Those comments by the Tribunal member show that he was prepared to treat lies told at the interview of 5 December 1995 not simply as providing a reason now to disbelieve the applicant but also as providing positive evidence of a fact which, on all accounts, was not correct." [viz, that the respondent was unmarried in December 1995].

16 Secondly, his Honour noted that the Tribunal, at the request of the respondent's solicitor, asked the respondent, after the exchange about the respondent's false denial of being married,

why he should find that the marriage was a genuine one and that the respondent explained that if he had admitted he was married at the December 1995 interview, he feared that may have resulted in cancellation of the temporary entry permit he then had and thus loss of his entitlement to pursue the application for the protection visa he also then had on foot (an explanation similar to that set out in his statutory declaration of February 1998). His Honour further noted that the wife gave evidence, which the Tribunal expressly accepted, that he had told her immediately before that December 1995 interview of his intention to falsely deny his marriage and his reason for doing that. Despite all this, his Honour observed:

“[41] The Tribunal did not make any findings about the genuineness of that fear, to which the applicant deposed and did not refer to Ms Asif’s evidence corroborating it.”

17 Finally, his Honour referred to what he described as “two forceful passages” involving lengthy, multi-barrelled questions put by the Tribunal to the respondent as supporting his view that the Tribunal was not open to be persuaded that the respondent did have a genuine commitment to the marriage at least at about the time it took place, ie, at about the time he made the visa application now in question.

18 It is apparent that the Tribunal had perused a range of material, as it was entitled to, before embarking upon the oral hearing. It is understandable, in view of the respondent’s record of persistent deceit in his dealings with the Immigration Department from 1989 onwards, that the Tribunal would, as it undoubtedly did, approach the evaluation of the evidence he gave to it with very considerable scepticism. It is also understandable that a decision-maker, confronted with what it could well regard as the respondent’s willingness to lie blatantly to it, might not only determine not to accept his evidence on anything, but might also feel (and display) some affront at being invited to accept the respondent’s protestation of constant truthfulness. Such a response by a tribunal to that kind of conduct by a litigant will not ordinarily provide evidence of apparent bias, let alone of actual bias: see *Galea v Galea* (1990) 19 NSWLR 263 at 279 - 280 and 283.

19 But, as the learned primary judge observed, rejection of the respondent’s own evidence that he had a genuine commitment to the marriage at its inception, ie, at about the date of his application for the visa now in question, could not, of itself, conclude the case against the respondent; yet that is how the Tribunal disposed of the case.

- 20 When a Tribunal has to assess whether a class 820 visa applicant meets the primary criteria of being “the spouse of an Australian citizen” and, in particular, whether it is satisfied, in terms of the definition of spouse in reg 1.15A(1)(b), that the two persons have a mutual commitment to a shared life as husband and wife and that the relationship between the two persons is genuine and continuing at both visa application date and date of decision, the credibility of the visa applicant, in asserting the existence of such a commitment and such a relationship, is of very considerable importance. But it is not necessarily decisive on either of these issues. Depending on the nature and extent of evidence coming from sources other than the applicant from, eg, his wife, relatives and acquaintances, a decision-maker adopting a proper approach to the visa entitlement claim may determine that the claim should succeed even though it rejects the evidence of the visa applicant himself as lacking credibility.
- 21 It was submitted by counsel for the appellant that, since the respondent’s commitment to and the genuineness of his relationship with his wife at the relevant dates and, in particular, at the date of visa application, depends upon his own subjective state of mind, a finding adverse to the applicant’s credibility must necessarily be fatal to his visa application. That is a surprising suggestion. Civil and criminal courts habitually perform the task of making necessary findings as to a particular person’s subjective state of mind in a wide variety of forensic contexts. It is an entirely orthodox approach for a court or tribunal charged with finding the facts to take into account, in determining whether to make a particular finding as to a person’s state of mind at a particular time, not only the evidence of the person as to what his state of mind was at the relevant time, but also the observations of anything that other witnesses saw and heard, that are also relevant to whether the person had the particular state of mind at the time in question.
- 22 Far from there being anything special in migration cases barring the decision-maker from taking this orthodox approach to fact finding when a Tribunal has to consider the nature of a visa applicant’s own commitment to and relationship with his spouse, this truism of forensic fact finding is entrenched in the definition of “spouse” in reg 1.15A of the Migration Regulations. Far from treating evidence extraneous to the visa applicant’s own testimony as irrelevant to proof of the nature of his own commitment to and relationship with his spouse, reg 1.15A(3) identifies classes of evidence from sources other than the applicant which are logically relevant to proving his state of mind on those issues and compels the decision-maker to have regard to such classes of evidence: sub-reg (3) provides that, “in forming an

opinion for the purposes of par 1(b) ... in relation to an application for a visa of sub-class ... 820 ..., the Minister **must** have regard to all the circumstances of the relationship including, in particular ...”, the various considerations set out in that sub-regulation.

23 In the context of this case, reg 1.15A(5) is also worthy of note. The respondent married his wife on 4 November 1995. At the date of the initial decision refusing his visa, the marriage had lasted over two years. At the date the Tribunal gave its decision, the date which the Tribunal considered was the relevant one so far as the criteria in par 820.22 are concerned, the marriage had lasted three and a half years. The ordinary approach to fact finding would suggest that the longer a marriage has in fact continued, the more ready will a decision-maker charged with the task of assessing whether it was a genuine one from its outset be to draw that conclusion. It is exactly that approach to proof of the issue in reg 1.15A(1)(b) of genuine and continuing relationship between visa applicant and spouse that is implicit in reg 1.15A(5). This sub-regulation creates something in the nature of a statutory presumption of the existence of a genuine marital relationship between the visa applicant and spouse, where they have cohabited for at least six months: such cohabitation is taken to be “strong evidence” that the relationship is genuine and continuing. This sub-regulation is so worded as to suggest that where the decision-maker has to decide whether a genuine marital relationship existed between a visa applicant and spouse who were together at a particular date, if at the time the question arises for determination the applicant and spouse have been together for six months (or more) that is to be taken as strong evidence that they were in a genuine and continuing relationship at the relevant date. To read this sub-regulation as the respondent would as making six months’ (or more) cohabitation strong evidence of a genuine and continuing relationship at a particular date only if the minimum six months’ period had already passed by that date involves an unwarranted gloss on what we regard as the clear words of the sub-regulation.

24 The Tribunal had a mass of material from sources external to the applicant that was capable of establishing the genuineness at relevant dates of the respondent’s commitment to and relationship with his wife, ie, to show that he could satisfy the relevant criteria at both relevant dates. This material appears to have been gathered by the respondent’s advisers with reg 1.15A(3) in mind in so far as it specifically deals with most of the matters therein listed. The Tribunal noted the existence of this body of oral and documentary evidence and even expressly accepted the reliability of some of the oral evidence. Yet it entirely ignored the

significance of this evidence as probative of the respondent's commitment to the marriage when he entered into it because the Tribunal was not prepared to look beyond the respondent's own testimony.

25 The respondent's wife gave evidence to the effect that there was a genuine marriage bond between her and the respondent and a genuine parental relationship between the respondent and her child of a previous marriage. The Tribunal accepted her as an honest witness and considered that she had made a genuine commitment to him. But it dismissed her evidence on the basis that "this cannot save this application because the commitment has to be mutual both at the date of primary application and as at today's date" and it was not satisfied that the respondent had such a commitment at the date of his visa application in November 1995, just after the marriage, though it accepted that such a commitment may have come to exist by the time of the hearing before it. This, as the learned primary judge noted, treats the evidence of the respondent's wife of the observations she made and the opinions she expressed that were directly relevant to and probative of his commitment to the marriage at about the time it took place as irrelevant to that issue.

26 The Tribunal also noted that, in addition to the wife's evidence, "there are a lot of supporting documentation on file including statements from friends and relatives, bank statements, copies of lease and other documents". But that is all the Tribunal member had to say about that quite substantial body of evidence. This documentation includes much material evidencing the existence of assets jointly owned and financial liabilities jointly assumed; it includes statements by persons acquainted with the respondent and his wife attesting to their observations reaching back to mid 1996, though mostly confined to the period from early 1998, of there being a real family relationship between the respondent, his wife and her child. There is much in this body of material relevant to whether the respondent and his wife had a mutual commitment to a shared life and a genuine and continuing relationship with each other throughout the period covered by this material. It was directly relevant to whether those two criteria were satisfied, not only at the date of the decision, but also at the date of the visa application. Yet the Tribunal, apart from merely noticing the existence of this material, ignored its probative significance.

27 We do not accept that the comment it made in its reasons for decision about there being insufficient evidence to persuade it that the respondent's commitment to his marriage was

genuine as at the date of the primary application was, as counsel for the appellant submitted, the Tribunal's elliptical assessment that this material did not satisfy it of the genuineness of the respondent's commitment to the marriage from its start. Not only did the Tribunal not indicate that it appreciated the relevance of this material to its task of assessing the nature of the respondent's commitment to and relationship with his wife at the earlier of the two relevant dates, but, in the immediately preceding passage in its reasons, it identifies unequivocally its rejection of the credibility of the respondent as the justification for its conclusion that he did not have a genuine commitment as at the date of visa application. Moreover, in the course of the hearing, the Tribunal commented on this mass of material indicating that it considered it was relevant only to whether, at the time of the hearing, the respondent had a genuine commitment to his wife. After stating that it was prepared to treat what he told the Departmental Officer at the interview on 5 December 1995 about not being married as a truthful statement and then giving the respondent opportunity to explain why he lied on that occasion, the Tribunal made these comments:

"MR METLEDGE: I will note in my decision that after the conversation between your solicitor and I, after I had indicated to you because you told that statement before you are going to lose the case, you came up to rationalise it now. But I believe you were telling the truth then, you see.

MR ASIF: Yes sir.

MR METLEDGE: Yes, you were telling the truth, that you are not married.

MR ASIF: No sir.

MR METLEDGE: In other words, you are going through all these steps, or you were at that stage - I don't know now - look, for all I know, now your marriage may be genuine, now, after two years. I don't know. But I have to be satisfied back in November '95, and within two weeks of that date you said, 'I'm not married.' Now, you may give me tonnes of evidence, which you have, obviously, to show me that your marriage is now genuine. It may well be now genuine. I won't find against you today. But that won't help you regarding this application. It may help you in subsequent applications.

Or I can go further if you wish and find - make a formal finding whether you are genuine today or not, and I may find you are not. I don't know. I may find you may. It is up to you. You better discuss it with your solicitor. Do you want a little adjournment?" (emphasis added)

28 The Tribunal member refused to acknowledge the obvious: this body of material was just as relevant to whether the respondent could satisfy the primary criteria at the date of the visa

application as it was to whether he could satisfy those criteria at the date of decision.

29 There is further evidence of the Tribunal's mind being closed to anything beyond the respondent's own testimony on the issue on which it based its decision. When the respondent's solicitor informed the Tribunal that he proposed to call the respondent's mother-in-law to give evidence concerning the marriage relationship, the Tribunal's response was to say that it was prepared to accept that, from an outsider's point of view, such as that of the mother-in-law, the appearances of a genuine courtship and marriage existed. The mother-in-law's evidence was well capable, if accepted, of justifying the inference that the respondent genuinely committed himself to his marriage from the outset. Even without hearing the mother-in-law, the Tribunal member was prepared to accept the truth of what she would say. But he made it clear that her evidence would not affect his view about whether the respondent's genuine commitment existed at the visa application date. This is a clear indication that the Tribunal's mind was closed to any evidence and any argument suggesting the existence at the visa application date of a genuine marriage on the part of the respondent, once it had determined that his own evidence on that issue was not worthy of any credence.

30 In our opinion, the learned primary judge was correct in his assessment that the Tribunal approached the case on the basis that, only if it were to accept the evidence of the applicant himself that the marriage relationship was a real and genuine one at any relevant date, would he make a finding in the respondent's favour. The way the respondent ignored the evidentiary significance of all the documentary material relevant to this issue and the way the Tribunal dealt with the proposal to call the respondent's mother-in-law to give evidence also relevant to this issue shows that the Tribunal had a closed mind to its task. As the learned primary judge noted, the Tribunal failed to consider whether the respondent's explanation for his lie in December 1995 about not being married might be true, even though his evidence here was corroborated by that of his wife, an honest witness according to it: this too shows a closed mind on the part of the Tribunal. Once it became convinced, as it undoubtedly did in the course of evidence, that the respondent who had a history of lying to the Department was also lying to the Tribunal, the Tribunal was not prepared to consider the probative value of any other evidence put before it on the two issues in reg 1.15A(1)(b). Perhaps the clearest demonstration that its mind was closed to all the other evidence and to argument relevant to the issue it considered was of critical importance is provided by its unexplained failure to comply with the statutory direction in reg 1.15A(3) to have regard to all the evidence relevant

to whether the respondent satisfied the primary criterion in par 820.211(2) from sources other than the respondent that was put before it and by its unexplained failure to deal with the subject matter of reg 1.15A(5). It set out the text of reg 1.15A in its reasons but had regard only to sub-reg 1(b), ignoring entirely sub-regs (3) and (5).

31 We agree with the learned primary judge that, in the circumstances of this case, the Tribunal's manner of questioning the respondent also evidenced that it had become biased against the respondent. But despite what it initially said about accepting that the respondent told the truth when he told the Departmental Officer in December 1995 that he was not married, we do not think (as the learned primary judge did) that the Tribunal ultimately relied on that denial of marriage as showing anything more than that the respondent was a wholly unreliable witness. We have already referred to what the Tribunal said the respondent may have meant when he falsely said he was not married when the Tribunal revisited his evidence on this point late in the hearing: contrary to the view of the learned primary judge, we do not think that the Tribunal cast any doubt on the legal validity of the marriage, when it said it accepted as true the respondent's statement that he was not married.

32 In its reasons, the Tribunal noted the comments it made during the course of the hearing, but then recognised that, though the respondent had consistently lied in an attempt to remain in Australia, "this is not to say that it logically follows that his commitment to his spouse is not genuine". The Tribunal member then reminded himself of relevant comments which he made in an earlier decision to the effect that the fact that parties may have lied about some matters does not necessarily mean that their commitment to each other is not genuine. He then expressed his conclusion in the passage already set out indicating that, even though the respondent may, by the date of the Tribunal's decision, have formed a genuine commitment to his wife, since the Tribunal member could not accept his evidence on the issue, it therefore found that he did not have such a commitment at the date of his visa application. But despite the Tribunal's appreciation of the theoretical possibility that the applicant's lack of truthfulness might not determine the matter, for the reasons we have given, we consider the learned primary judge was right in finding that the Tribunal's decision was affected by actual bias. In disposing of the case on the basis it did, the Tribunal went beyond making a mere error of law and went beyond adopting an erroneous approach to the task committed to it of finding the relevant facts. Its steadfast refusal to evaluate the probative force of any of the evidence from sources other than the respondent himself that was relevant to the issue on

which it based its decision shows that once it became convinced that the respondent was a wholly untruthful witness the case was over: from that point, the respondent had to lose, irrespective of how cogent the body of evidence he produced from others was on the issue of his attitude to his marriage and to his wife at the earlier (as well as the later) relevant date. As Kirby A-CJ said in *Galea v Galea* at 278:

“... the test for the appearance of impartiality is not one applied only at the outset of proceedings or in respect of preconceptions. From first to last, from beginning to end, the appearance of an impartial and unprejudiced mind on the part of a judicial officer is of the essence of the system of justice. If at any point there is a loss, in fact or appearance, of that impartiality the trial will thereafter miscarry.”

- 33 Though his Honour was here speaking of apparent bias, his comments apply with equal force to a tribunal that becomes actually biased part way through a hearing.
- 34 In agreeing with the learned primary judge that the decision was affected by actual bias, we do not suggest that the Tribunal acted otherwise than in good faith: it appears to have allowed its understandable distaste for the respondent’s willingness to lie to advance his claims to distract it from giving proper consideration to the whole of the case the respondent presented. But, as the authorities show, the presence of good faith is not necessarily incompatible with actual bias on the part of the decision-maker in not being receptive to relevant evidence and argument opposing the point of view to which the decision-maker has become committed before announcing his decision.
- 35 In our opinion, the appeal should be dismissed with costs.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 7 March 2000

Counsel for the Applicant: R Henderson

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent:	J Glissan QC
Solicitor for the Respondent:	Christopher Levingston & Associates
Date of Hearing:	28 February 2000
Date of Judgment:	7 March 2000